In the Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1210

JOHN BALLESTRASSE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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vs.

United States of America,
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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

The Petitioner, John Ballestrasse, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered January 31, 1977.

OPINION BELOW

The Court of Appeals entered its opinion on January 31, 1977. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

Whether the ruling of the court below that rebuttal evidence, inadmissible in the Government's case-in-chief, was admissible even though it rebutted testimony extracted from petitioner by the government on cross-examination conflicts with the decision of the Second Circuit in United States v. Mariani, *539 F.2d 915 (1976).*

II

Whether the ruling of the court below that the prosecutor's emphasis of the fact that petitioner consulted an attorney during his grand jury appearances did not violate petitioner's fifth and sixth amendment rights conflicts with decisions of this Court.

III

Whether the ruling of the court below that the trial court did not err in failing to instruct the jury that, to convict, all twelve jurors must agree unanimously upon at least one of the statements in count one of the indictment as having been perjured conflicts with decisions of this Court.

STATEMENT OF THE CASE

Petitioner John Ballestrasse was indicted by the Grand Jury for the Northern District of California on August 7, 1975 in a four-count indictment which charged that he violated 18 U.S.C. § 1623 by making false material declarations to a federal grand jury investigating violations of narcotics laws by law enforcement officers (R. 1-5).[1] Specifically, count one charged that, on March 19 and April 10, 1975, Ballestrasse willfully and knowingly testified falsely in that he denied having conversations with Billy Ethridge and Welsh Long in 1970 regarding the fixing of Ethridge's case (R. 2-3). Count four[2] alleged that, on June 26, 1975, Ballestrasse testified falsely in that he denied receiving the sum of nine-thousand dollars from Lonnie Murray in March, 1968 in order to assist Murray on a case pending against him (R. 4-5).

Ballestrasse was tried by a jury before the Honorable Stanley A. Weigel between October 15 and 21, 1975 (R. 37-38). At trial, three government witnesses—all with extensive criminal records—testified that in October 1970, Ballestrasse, then a bailbondsman, bailed Billy Ethridge out of jail after a narcotics arrest and subsequently told Ethridge it would cost him about $7,000 to fix his case (T. 62, 67-68, 98-101, 120-121). Later the price was reduced to $2,500 which was paid to petitioner.

Lonnie Murray, in federal custody serving a seven-year sentence at the time of the trial, was the sole government witness as to count four of the indictment. He had been arrested in San Francisco for sales of heroin in 1968 and was bailed out of jail by petitioner (T. 137, 142-143). Murray testified that petitioner told him the case could be taken care of for $6,500 (T. 138). Murray paid that sum plus another $3,000 which Ballestrasse later demanded (T. 139-140).

Petitioner Ballestrasse testified in his own behalf and refuted the testimony of the government witnesses. He stated that he bailed out Ethridge and four other persons arrested with him in 1970, and Ethridge paid him $2,500 but

1. Abbreviation key: R. = Clerk's Record on Appeal; T. = Reporter's Transcript on Appeal.

2. Counts two and three also charged that Ballestrasse testified falsely regarding the subject of "fixing" cases. The jury, however, found Ballestrasse not guilty on these counts (R. 39), and they are not directly relevant to this petition.

that sum represented collateral on the bail (T. 258-260). Ballestrasse insisted upon this collateral because two of the four persons arrested had previously jumped bail (T. 262). He denied offering to fix Ethridge's case, never told him he had "juice", and never told Welsh Long he was taking care of Ethridge's case (T. 262-264).

As to Lonnie Murray, Ballestrasse testified that in March, 1968, he bailed out Murray and seven other defendants at Murray's request (T. 280). The total amount of the bail was $18,000 and Ballestrasse received $5,000 cash from Murray as security and $1,700 premium (T. 282-283). It was this money which Ballestrasse received from Murray and not money to fix a case.

Petitioner readily admitted that he had discussed fixing cases for money with as many as fifty persons and had taken money to fix cases but had never actually fixed a case and had never discussed fixing cases with police officers or offered money to them (T. 292-294, 351, 366). He strongly denied that he had discussed fixing Murray's case with Murray or anyone else (T. 289, 358). Ballestrasse did approach the officer who arrested Murray on Murray's behalf but the purpose was to see if the officer would reconsider his previous rejection of Murray's offer to work as an informer for the police department. In fact, Ballestrasse did arrange for Murray to inform and Murray did inform for the police (T. 290-291, 335-338). This fact was substantiated by Forrest E. Jones of the California Department of Justice, Bureau of Narcotic Enforcement, who corroborated Ballestrasse and contradicted Murray by stating that Murray had informed on more than one occasion (T. 242). At one time, Jones personally participated in an arrest in San Francisco which was based on information supplied by Mur-

ray who, in return for his information, received benefit on a pending charge (T. 240-241).

The jury returned verdicts of guilty as to counts one and four, and verdicts of not guilty on counts two and three (R. 38, 39; T. 509). On November 25, 1975, Judge Weigel sentenced petitioner to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year and one day on each of counts one and four, the sentences to run concurrently (R. 71). The Ninth Circuit Court of Appeals affirmed the judgment of conviction (Appendix A).

REASONS FOR GRANTING THE WRIT

1. The ruling of the court below that rebuttal evidence, inadmissible in the government's case-in-chief, was admissible even though it rebutted testimony extracted from petitioner by the government on cross-examination conflicts with the decision of the Second Circuit in United States v. Mariani, 539 F.2d 915 (1976).

Petitioner's defense at trial was that, although as a bail-bondsman he told clients he could fix their cases and even accepted money from them to fix cases, he did not attempt to fix the cases of Billy Ethridge or Lonnie Murray and did not request or accept money from them or anyone else for that purpose.

While cross-examining petitioner Ballestrasse, the government attorney asked him if he knew a man named Gus Foundas (T. 362). He replied that he did, that he knew Foundas had been arrested in January, 1972 for assaulting a meter maid, and that Foundas was bailed out by Ballestrasse's bail bond office but not by him personally (T. 362-363). Ballestrasse denied having a conversation with Foundas about his case, stated that he was not present when the subject of fixing Foundas' case came up in a con-

versation between Foundas and Tony Ballestrasse, the petitioner's cousin, and that he made no efforts to arrange to fix Foundas' case (T. 364-365).

The government called Foundas to the stand in rebuttal. Over defense counsel's objection, Foundas testified that Tony Ballestrasse told him that his case could be fixed for $1,000 (T. 389-390, 393). The government played a tape of a telephone conversation between Foundas and John Ballestrasse during which Ballestrasse stated, "we're trying to get something going, but it's tough. Hey, nobody wants to touch it." (T. 396).

On cross-examination, Foundas admitted that Ballestrasse never said he could fix Foundas' case and that he was never in the same room when his cousin Tony talked about fixing the case (T. 410, 417, 419). In fact, Foundas asked Tony Ballestrasse to arrange a release from the meter maid in return for payment of damages to her—a civil settlement rather than criminal proceedings—and was not seeking to bribe anyone (T. 412-413).

On appeal, petitioner argued that the prosecutor's cross-examination of him regarding Foundas was improper and irrelevant because it concerned alleged participation in specific acts of criminal conduct unrelated to the issue of the defendant's guilt or innocence of the offense charged. See, e.g., *Courtney v. United States,* 390 F.2d 521, 529-530 (9th Cir.), *cert. denied,* 393 U.S. 857 (1968).

Moreover, Foundas' rebuttal testimony was inadmissible as it did not rebut any evidence *offered by the defense* but rather rebutted testimony elicited from Ballestrasse by the government on cross-examination. Furthermore, it constituted inadmissible hearsay and was irrelevant to the issue of Ballestrasse's guilt or innocence on the charges for which he was indicted. Ballestrasse was not charged with bribery

or "fixing" a case but rather with making material false statements to a grand jury in violation of 18 U.S.C. § 1623. Foundas' testimony had nothing whatsoever to do with the offense for which Ballestrasse was on trial.

The Court of Appeals rejected petitioner's arguments on the grounds that no objection was made at trial[3] and, in any event, the evidence was admissible under Fed.R. Evid. 404(b). This ruling conflicts with the decision of the Second Circuit Court of Appeals in *United States v. Mariani,* 539 F.2d 915 (1976). There, the defendant testified, in response to the prosecutor's cross-examination, that he would not rob a bank. The government, in rebuttal of that statement, introduced evidence of bullets which had been seized from the defendant during an illegal search and, as such, were inadmissible in the case-in-chief. The Court held "that it is impermissible for the government to rebut, by use of evidence inadmissible in its case-in-chief, the testimony extracted from the defendant only on cross-examination." 539 F.2d 924.

The decisions in *Mariani* and in the instant case are in conflict and petitioner respectfully suggests that this Court grant this petition to resolve the conflict.

2. The ruling of the court below that the prosecutor's emphasis of the fact that petitioner consulted an attorney during his grand jury appearances did not violate petitioner's Fifth and Sixth Amendment rights conflicts with decisions of this Court.

During cross-examination, the Assistant United States Attorney questioned petitioner as follows:

> Q. "As a matter of fact, you went out and hired an attorney to talk with about the case; did you not?"

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3. A timely objection was made at trial. (See T. 389). In addition the issue was thoroughly discussed in petitioner's post-trial motion for judgment of acquittal (R. 50-61).

A. "Uh-huh [affirmative]."

Q. "And you prepared, you spoke with the attorney on some occasions before you even came into the Grand Jury; isn't that correct?"

A. "That's correct."

Q. "Now, did you check your records to see what records you might have with regard to that episode?"

A. "I looked through some boxes after my immediate involvement with it, with the Grand Jury."

Q. "No, I'm talking about before you came to the Grand Jury when you were nervous and concerned and you hired an attorney and you were getting ready to answer questions in the Grand Jury. Did you go through your records to see if you had any records?"

MR. BROWN [defense counsel]: "Your Honor, I object to the frame of the question. The witness has not said he was nervous or none of those things. I think if he asked him whether or not, before March 19, he looked at the records before the Grand Jury, then the witness could answer, but the question is compound."

MR. HINCKLEY [United States Attorney]: "I will withdraw and proceed again."

Q. "Were you concerned about your appearance before the Grand Jury?"

A. "Yes, I was."

Q. "Were you so concerned that you went out and hired an attorney to advise you before the Grand Jury?"

A. "Yes, I did."

(T. 310-311).

Later, the prosecutor again quizzed Ballestrasse on the presence of an attorney at the grand jury:

Q. "Now is your recollection better today than it was when you testified in the grand jury?"

A. "Absolutely, yes. I am scared to death of the grand jury. You had me up there all by myself and I didn't know what the hell was going on."

Q. "All by yourself, Mr. Ballestrasse? Didn't you have an attorney with you?"

A. "Out in the hall. That is nowhere."

Q. "And did you get up and leave the grand jury room to talk to him?"

A. "Many times."

Q. "Would you say many, many times?

A. "Many, many times, yes, I did."

Q. "In fact, would you say over 15 times during the questioning?"

A. "I don't know how many times I left the room, but I didn't know what you were, you know, what you were trying to drive at."

Q. "Didn't you write the questions down and go out and talk to him about the questions?"

A. "Have you ever been before the grand jury?"

Q. "Mr. Ballestrasse, didn't you write the questions down and go out and talk to him about the questions?"

A. "Yes, I did, Mr. Hinckley."

Q. "Many, many times?"

A. "Yes, and I came back and re-asked the questions, went back out again, and asked my lawyer again."

Q. "Sometimes twice on one question."

A. "That is correct."

(T. 356-357).

On still a third occasion, the prosecutor asked Ballestrasse about the presence of his attorney:

Q. "But you went out and talked to your attorney about these matters and had conversations, then came back in and answered these questions?"

A. "He knew less than I did about these people."

Q. "But you still had to go out and talk to him about it?"

A. "That is correct."

(T. 360).

Petitioner argued in the court below that the prosecutor's repeated reference to the fact that he was represented by, and "many times" consulted with, counsel when confronted by grand jury questions violated his Sixth Amendment right to counsel and Fifth Amendment privilege against self-incrimination. The obvious implication to be drawn from the prosecutor's questioning was that, because petitioner retained counsel to assist him in the grand jury proceedings, he was hiding something or testifying falsely. He was discredited in the eyes of the jury because of his assertion of his right to leave the grand jury room to consult with his counsel.

The Court of Appeals rejected this argument, stating that "[t]he brief references made by the Government to the fact of representation were permissible to rebut appellant's testimony that he had not taken the grand jury investigation seriously and that he was scared, alone, and confused at the time of his appearance." (Appendix A, p. ....).

Petitioner *did* testify that he was "scared" (T. 311, 356), but such testimony took place *after* the government had emphasized that he had gone "out and hired an attorney to talk with about the case." (T. 310). In fact, the first statement that Ballestrasse was "nervous and concerned" came from the lips of the prosecutor (T. 311).

The decision of the court below conflicts with the principles announced by this Court in *Grunewald v. United States,* 353 U.S. 391 (1957), a case in which a grand jury witness refused to answer certain questions on Fifth Amendment grounds but later, while on trial for conspiracy to "fix" tax fraud cases, took the stand and answered those questions. On cross-examination, the prosecutor

established that he had previously refused to answer the questions. This Court held that the trial judge committed prejudicial error by permitting cross-examination of the defendant on his plea of Fifth Amendment privilege before the grand jury. Similarly, in the instant case, the prosecutor's repeated cross-examination of Ballestrasse on the exercise of his Sixth Amendment right to counsel denied him a fair trial. As Mr. Justice Black noted in concurring in *Grunewald,* "I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privilege is largely destroyed if persons can be penalized for relying on them." 353 U.S. at 425. See also, *United States v. Hale,* 422 U.S. 171 (1975) (Douglas, J., concurring).

Courts have ruled that the prosecution may not use at trial the fact that a defendant, when arrested, requested counsel. See, e.g., *United States v. Faulkenbery* 472 F.2d 879 (9th Cir.), *cert. denied,* 411 U.S. 970 (1973); *Baker v. United States,* 357 F.2d 11, 13 (5th Cir. 1966); *Miranda v. Arizona,* 384 U.S. 436, 468 n. 37 (1966). See also *Doyle v. Ohio,* ..... U.S. ....., 96 S.Ct. 2240 (1976). Evidence that a grand jury witness requested and conferred with counsel is equally objectionable. Its only purpose can be to inject an innuendo that, if a witness needs to consult an attorney, he is not testifying truthfully. Such an innuendo has no place in a federal criminal trial. Petitioner respectfully suggests that this Court grant this petition to resolve the conflict between the decision in the instant case and this Court's decision in *Grunewald, supra,* and the other cited cases.

3. The ruling of the court below that the trial court did not err in failing to instruct the jury that, to convict, all twelve jurors must agree unanimously upon at least one of the statements in count one of the indictment as having been perjured conflicts with decisions of this Court.

Unlike the other counts of the indictment, count one contained a series of at least four questions and answers covering three grand jury appearances (R. 2-3). The jury was instructed in general terms that it could not return a verdict of guilty without unanimity of opinion. It was not, however, instructed that it must reach unanimity of opinion of falsity in at least one particular answer among those set forth in count one of the indictment. Therefore, although presumably all twelve jurors agreed that petitioner perjured himself as to at least one of the answers, there is no way of ascertaining whether they reached agreement as to precisely which answer was perjured.

This is in conflict with this Court's decision in *Yates v. United States,* 354 U.S. 298 (1957), in which the trial court, in a conspiracy case, submitted to the jury two overt acts, one of which had been barred by the applicable statute of limitations. This Court reversed the conviction, noting that there was no way of knowing whether the jury had based its verdict upon the barred act or the valid one. The Court stated that a conviction cannot stand on "an equivocal direction to the jury on a basic issue." 354 U.S. at 327. A number of other decisions of this Court have applied this general principle. See, e.g., *Stromberg v. California,* 283 U.S. 359, 367-368 (1931); *Cramer v. United States,* 325 U.S. 1, 36 n. 45 (1945); *Leary v. United States,* 395 U.S. 6 (1969), and *Street v. New York,* 394 U.S. 576 (1969).

This petition should be granted to resolve this conflict.

CONCLUSION

For the foregoing reasons, petitioner respectfully suggests that a writ of certiorari should issue in this case.

Dated: March 1, 1977.

Respectfully submitted,

J. FRANK MCCABE

Attorney for Petitioner

(Appendix follows)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 75-3765

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN BALLESTRASSE,
Defendant-Appellant.

MEMORANDUM

[January 31, 1977]

Appeal from the United States District Court
for the Northern District of California

Before: SNEED and KENNEDY, Circuit Judges,
and RICHEY,* District Judge.

After a jury trial, John Ballestrasse was convicted of two counts charging that he made false declarations before a grand jury in violation of 18 U.S.C. § 1623. He appeals, contending that it was error for the trial court to permit testimony as to the matters set forth below. We affirm.

In 1975 a federal grand jury conducted an inquiry to determine whether certain law enforcement officers had violated narcotics and conspiracy laws. As a part of the investigation, the grand jury summoned appellant, a San Francisco bailbondsman, and questioned him about conversations and transactions relating to fixing criminal cases. Appellant testified at three grand jury sessions and denied engaging in certain conversations about fixing criminal

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*Honorable Mary Anne Richey, United States District Judge for the District of Arizona, sitting by designation.

cases. Based on these answers, appellant was indicted on four counts of perjury. He was acquitted on two counts. His conviction for the other two counts forms the basis of the instant appeal.

Ballestrasse testified at the trial and admitted that he had discussed fixing criminal cases with various persons. The apparent defense theory, however, was that appellant had these conversations only to prevent financially untrustworthy persons from jumping bail, and that he never seriously intended to fix cases. If that testimony had been believed, the defense may have been able to show that the answers given to the grand jury were true. To counter any contention that the defendant did not seriously intend to fix cases, the Government on cross-examination asked whether he had ever discussed fixing a criminal case for one Gus Foundas. The conversations with Foundas were unrerelated to appellant's testimony before the grand jury. Defense counsel, however, failed to object to the line of questioning. Ballestrasse testified that he never had any discussion with Foundas about fixing the latter's case. Since Foundas was a financially responsible person, the Government's theory was that appellant had indeed intended to fix that case, and by inference, others as well.

In its rebuttal case the Government called Foundas, who testified that he had discussed fixing his case with appellant. A tape recording was also played for the jury to corroborate Foundas' testimony. Again, the defense interposed no substantive objections.

Ballestrasse argues for the first time on appeal that the trial court erred in admitting evidence pertaining to the Foundas matter. He claims that such evidence was introduced to prove prior bad acts, and as such, was inadmissible under Fed. R. Evid. 404.

If objections to evidence are not made at the time evidence is offered, the admissibility of the evidence cannot be raised on appeal, unless, in the sound discretion of this court, "plain error" exists. Fed. R. Civ. P. 52; United States v. Trejo, 501 F.2d 138 (9th Cir. 1974); Marshall v. United States, 409 F.2d 925 (9th Cir. 1969). The plain error rule should be invoked only in exceptional cases where it appears to be necessary to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial system. *United States v. Trejo,* 501 F.2d at 141. Such is not the case here. Indeed, the defense itself opened the line of inquiry into whether appellant actually intended to fix cases.

While failure to object is dispositive in this case, we think it appropriate to add that even if a timely objection to the disputed testimony had been made, the evidence would be admissible to rebut appellant's assertion that he never intended to fix a case. Fed. R. Evid. 404(b). Appellant's testimony that he discussed fixing solely to prevent bail jumping is essentially an assertion that he lacked intent to engage in the unlawful activity. Without deciding the merits of such a defense, we are convinced that under rule 404(b) the testimony of Foundas was proper.

Appellant further contends that his fifth and sixth amendment rights were violated because the prosecution asked him on cross-examination whether he had retained an attorney to advise him during his grand jury appearance. We disagree. The brief references made by the Government to the fact of representation were permissible to rebut appellant's testimony that he had not taken the grand jury investigation seriously and that he was scared, alone, and confused at the time of his appearance.

The defense, moreover, made no objection to the Government's questioning relating to whether appellant had legal representation during his grand jury appearance. Again,

we will not consider appellant's contention unless admission of the evidence constituted plain error. In view of the permissible purpose behind the Government's questioning, admission of the evidence as to the fact of legal representation before the grand jury cannot be characterized even as improper, and it most certainly is not plain error. We have considered appellant's other contentions and find them without merit.

AFFIRMED.

No. 76-1210

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN BALLESTRASSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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JOHN BALLESTRASSE, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1977. The petition for a writ of certiorari was filed on March 2, 1977. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in admitting rebuttal evidence to impeach petitioner's testimony.

2. Whether, in the circumstances of this case, petitioner was denied a fair trial because he was cross-examined about

whether he had been accompanied by counsel when he appeared before the grand jury.

3. Whether the district court's instructions adequately informed the jury that its verdict had to be unanimous.

STATEMENT

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on two counts of making a false statement before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to concurrent terms of one year and one day's imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that Lonnie Murray was arrested on March 20, 1968, for possession of heroin with intent to distribute it (Tr. 137, 143). Murray offered money to the arresting officer and asked if something could be done about his case. The officer replied that someone would contact him the following day. That evening Murray was released on bail, which had been provided by petitioner, a bail bondsman in San Francisco (Tr. 137). The next day petitioner met with Murray and stated that his case could be taken care of for $6,000 (Tr. 138-139). Murray immediately paid petitioner that amount and, at petitioner's request, subsequently gave petitioner an additional $3,000. In return, petitioner promised to arrange for Murray to be sentenced either to a maximum of one year in the county jail or to probation (Tr. 139-140).

On September 30, 1970, Joseph "Billy" Ethridge and four other persons were arrested for narcotics violations (Tr. 21, 59-60). Upon their release on bail provided by petitioner, Ethridge and the others went to petitioner's office, where Ethridge inquired how much it would cost to fix the case

(Tr. 61-63). Petitioner stated that it could be fixed for $7,000 (Tr. 63). The price was thereafter reduced to $2,500, which Ethridge gave to petitioner in return for petitioner's agreement to obtain dismissal of the charges (Tr. 66-68). Some time later Ethridge, as an added precaution, also paid Welsh Long $2,500 or $3,000 to fix his case (Tr. 68-69, 98-99). When Long informed petitioner of this payment, petitioner stated that he would take care of the matter and told Long to leave the case alone (Tr. 99-100).

In March, April, and June 1975, petitioner appeared before a federal grand jury that was investigating the alleged bribery of police officers and their failure to enforce the narcotics laws (Tr. 11). Specifically, the grand jury was attempting to determine whether a conspiracy existed among narcotics officers and others in which the officers were receiving money for the purpose of fixing the cases of persons arrested for drug offenses. In his testimony before the grand jury, petitioner falsely denied talking to Ethridge or anyone else about fixing his case, telling Long that he would take care of Ethridge's case, or receiving $9,000 in return for offering to fix Murray's case (Tr. 209-211).

ARGUMENT

1. Although petitioner testified on direct examination at trial that he had discussed fixing cases with clients and had taken money from some of those individuals, he denied that he had ever discussed fixing a case with police officers or had ever actually fixed a case (Tr. 292-293). On cross-examination, petitioner stated that if a client sought to have his case fixed, he might discuss with the police officer the possibility of obtaining leniency if the client were to become an informant or were to return contraband (Tr. 350-351). In addition, petitioner unequivocally denied that he had attempted to fix a case on behalf of Gus Foundas or that he had ever spoken to Foundas about fixing his case (Tr. 362-365).

To rebut these assertions, the government called Foundas, who testified that Tony Ballestrasse, petitioner's cousin, had told him that he could have the case against Foundas fixed for $1,000 (Tr. 389-390, 393). The government also played a recorded telephone conversation about the case in which petitioner told Foundas, "Well, we're trying to get something going, but it's tough. Hey, nobody wants to touch it" (Tr. 396).

Petitioner contends (Pet. 5-7) that the district court erred in allowing the introduction of the government's rebuttal evidence, alleging that Foundas' testimony was irrelevant to the charges against him and that the testimony was inadmissible because it impeached statements that had been elicited on cross-examination. Petitioner did not object to this evidence at trial, however, and he therefore must demonstrate not only that the trial judge abused his discretion but also that the ruling constituted plain error. Fed. R. Crim. P. 52(b).[1]

The court of appeals correctly concluded (Pet. App. 2-3) that petitioner's claims are insubstantial. The mode and order of presenting evidence are within the reasonable control of the district court (Fed. R. Evid. 611(a)) and there is no general rule barring the introduction of evidence, not collateral to the issues in the case, in order to rebut testimony given during cross-examination. See *McCormick on Evidence* §47, p. 99 (2d ed. 1972). Foundas' testimony indicated that petitioner had engaged in past attempts to fix criminal cases. Hence, it was strong circumstantial evidence that he similarly had tried to fix Ethridge's and Murray's

[1]Petitioner's "timely objection" (Pet. 7, n. 3) was based upon an evidentiary matter wholly unrelated to the issue presented here (Tr. 389).

cases and that he had lied about these matters in his grand jury testimony.

Contrary to petitioner's contention (Pet. 7), the decision below does not conflict with *United States* v. *Mariani*, 539 F. 2d 915 (C.A. 2). In *Mariani*, the court held that illegally seized evidence, not admissible as part of the government's case-in-chief, could not be used to impeach a defendant about matters beyond the scope of his direct examination. 539 F. 2d at 923-924. Here, however, Foundas' testimony was not tainted and could have been introduced as part of the government's direct case in order to prove petitioner's criminal intent and to dispel the notion that his false answers were a mistake or accident. See Fed. R. Evid. 404(b); *United States* v. *Calvert*, 523 F. 2d 895, 911-912 (C.A. 8), certiorari denied, 424 U.S. 911; *United States* v. *Trapnell*, 495 F. 2d 22, 25 (C.A. 2), certiorari denied, 419 U.S. 851.

2. Petitioner asserts (Pet. 7-11) that his Fifth and Sixth Amendment rights were violated by the prosecutor's "repeated reference" during cross-examination to the fact that petitioner retained and consulted counsel before and during his appearance in the grand jury. Again, however, petitioner failed to object to this questioning (Tr. 311-312, 356-357, 360), and the claim does not amount to plain error. As the court of appeals observed (Pet. App. 3), petitioner testified at trial that he was alone, scared, and confused when he appeared in the grand jury (Tr. 356). This testimony obviously was designed to convince the jury that any inaccuracies in petitioner's grand jury testimony were the product of nervousness or confusion—a point that his counsel reiterated on summation (Tr. 478-479). Reference to petitioner's legal representation at the time of his appearance was admissible to rebut that contention and to establish that petitioner made the false statements alleged in

the indictment with criminal intent, which was an element of the offense.[2]

Grunewald v. *United States*, 353 U.S. 391, does not require a different result. There, the Court held that it was error to permit the defendant to be cross-examined about his assertion of the privilege against self-incrimination before the grand jury, in light of the minimal probative value and potential for extreme prejudice in such questioning. See *Doyle* v. *Ohio*, 426 U.S. 610, 616-620; *United States* v. *Hale*, 422 U.S. 171, 177-180. As noted above, however, petitioner's frequent consultation with his attorney prior to and during his grand jury testimony was unquestionably probative, since it tended to establish that his false statements were intentional and it rebutted his trial testimony that he had been "scared to death of the grand jury. [I was] up there all by myself and I didn't know what the hell was going on" (Tr. 356). Furthermore, unlike the disclosure that a defendant once refused to answer a question out of fear of incriminating himself, the fact that a defendant consulted counsel before testifying before the grand jury does not suggest that he may be guilty of a crime. As the Seventh Circuit recently observed in rejecting a similar argument (*United States* v. *Kopel*, C.A. 7, No. 76-1601, decided April 19, 1977, slip op. 7):

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[2]Petitioner correctly notes that one of the prosecutor's references occurred prior to his testimony that he was confused and alone during his grand jury appearance (Tr. 311-312). Since the later references were admissible, however, any impropriety in the earlier questions about the same matter was harmless beyond a reasonable doubt. See, *e.g.*, *In re Penn*, 443 F. 2d 663, 666 (C.A. D.C.). The jury's discriminating verdict—finding petitioner not guilty on two of the four counts, all of which were based on his testimony before the same grand jury—indicates that these brief colloquies were not significant, a fact that is further underscored by petitioner's failure to object to the questions at trial.

> [We] cannot agree with the defendant's implied assertion that laymen would view a putative defendant's use of counsel in a grand jury appearance as a "badge of guilt." While the Supreme Court in *Ullman* v. *United States*, 350 U.S. 422, 426 (1956), asserted that too many Americans viewed the Fifth Amendment privilege as a "shelter for wrongdoers," it has never found such widespread misunderstanding regarding the Sixth Amendment guarantee of effective assistance of counsel. Certainly today, when the layman frequently views our criminal justice system as being confusing and complex, consultation with an attorney is not tantamount to an admission of involvement or guilt.

3. Petitioner contends (Pet. 12) that the district court's instructions inadequately informed the jury that its verdict on Count One of the indictment had to be unanimous. Count One contained four specifications of perjury, all of which related to petitioner's denials that he had ever discussed fixing Ethridge's case with anyone. Petitioner asserts that because the jury was instructed only that its verdict must be unanimous, the jury may have found him guilty on Count One without agreeing on which particular statement was false.[3]

Petitioner's claim relates solely to Count One of the indictment. Because he received concurrent sentences on that count and on Count Four, the Court need not consider the issue. *Barnes* v. *United States*, 412 U.S. 837,

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[3]Petitioner does not challenge the validity of the inclusion of more than one allegedly false statement in a single count. See Rule 7(c), Fed. R. Crim. P.; *United States* v. *Bonacorsa*, 528 F. 2d 1218, 1221 (C.A. 2), certiorari denied, 426 U.S. 935; *United States* v. *Edmondson*, 410 F. 2d 670, 673, n. 6 (C.A. 5), certiorari denied, 396 U.S. 966.

848, n. 16. Moreover, since petitioner neither objected at trial to the district court's charge to the jury, nor proposed additional instructions to remedy the alleged defect, he is foreclosed from raising the claim at this stage of the proceedings. See Fed. R. Crim. P. 30; *Vitello* v. *United States,* 425 F. 2d 416, 423 (C.A. 9), certiorari denied, 400 U.S. 822.

In any event, there is nothing to petitioner's assertions. The jury was instructed that, as to those counts containing more than one allegedly false statement, a conviction could be sustained on proof that any one such statement was perjured (Supp. Tr. II, p. 9). The jury was also instructed that its verdict had to be unanimous (Tr. 501). Those instructions were sufficient, for "[i]t is assumed that a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict." *United States* v. *Natelli,* 527 F. 2d 311, 325 (C.A. 2), certiorari denied, 425 U.S. 934. See also *Vitello* v. *United States, supra,* 425 F. 2d at 422-423; *United States* v. *Armone,* 363 F. 2d 385, 398 (C.A. 2), certiorari denied, 385 U.S. 957.

Yates v. *United States,* 354 U.S. 298, *Stromberg* v. *California,* 283 U.S. 359, and the remaining cases cited by petitioner (Pet. 12) have nothing to do with the requirement that the jury's verdict be unanimous. Each holds that when a case has been submitted to the jury on alternative theories, the resulting conviction must be set aside if one or more of those theories is constitutionally invalid. Petitioner does not challenge the validity of his conviction as to any of the specifications of perjury in Count One, nor could he, in light of the substantial evidence of falsity of each of those statements. See *United States* v. *Natelli, supra,* 527 F. 2d at 325.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1977.